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# SUPREME COURT OF THE UNITED STATES.

## No. 85.

ALEXANDER REY AND WILLIAM R. MARSHALL AND JOSEPH M. MARSHALL, PARTNERS UNDER THE NAME, STYLE AND FIRM OF MARSHALL & CO., PLAINTIFFS IN ERROR,

vs.

JAMES W. SIMPSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MINNESOTA.

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GIDEON, Print.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Justices of the Supreme Court of the United States, in and for the Territory of Minnesota, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between James W. Simpson, plaintiff, and Alexander Rey and William R. Marshall and Joseph M. Marshall, partners under the name, style and firm of Marshall & Co., defendants, in an action upon a certain promissory note, a manifest error hath intervened, to the great damage of the said Joseph M. Marshall and William R. Marshall, as by their complaint appears, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December next at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Roger B. Taney, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this [SEAL.] 19th day of March, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-first.

GEORGE W. PRESCOTT,
*Clerk of said Supreme Court of Minnesota.*

To the honorable Justices of the Supreme Court of the United States:

The return to this writ appears by the schedule hereto annexed.

The answer of the judges of the supreme court of Minnesota Territory within mentioned.

GEORGE W. PRESCOTT, *Clerk.* [SEAL.]

TERRITORY OF MINNESOTA.

United States of America to the hon. Judge of the District Court for the 2d judicial district, Territory of Minnesota, greeting:

Because in the record and proceedings, and also in the rendition of judgment, in a certain action lately pending in your court, held in and for the county of Ramsey, in said 2d district, wherein James

W. Simpson was plaintiff and Alexander Rey and Wm. R. Marshall and Joseph M. Marshallwere defendants, error has intervened, as it is said, to the damage of said defendants, Wm. R. and Joseph M. Marshall, and we being willing that such error, if any there be, should be corrected, and full and speedy justice done in that behalf, do, in the name of the United States, command you, that without delay you send to us, distinctly and openly, under the seal of your court, and annexed to this writ, a certified transcript of the judgment roll which is on file in said cause in your said court, together with an authenticated copy of the original files, bill of exceptions, and pleadings therein, so that, having the same in our supreme court at the Capitol in the city of St. Paul on the first day of the next term of our said court, we may cause further to be done herein what of right, and according to the laws of the land, ought to be done.

Witness the Hon. Wm. H. Welch, chief justice of said supreme court, at St. Paul aforesaid, this 18th day of September, A. D. 1856.

[SEAL.]

GEORGE W. PRESCOTT, *Clerk.*

To the hon. Supreme Court of the Territory of Minnesota:

The return to this writ appears by the schedule hereto annexed.

The answer of the judge of the district court within mentioned.

Attest: G. W. PRESCOTT, *Clerk.*

(*The foregoing endorsed:*)

94.—Supreme court Territory of Minnesota. Marshall & Co., pl'ffs in error, against J. W. Simpson, def't in error. Writ of error to dist. court, 2d dist., Ramsey county.—1305. Rec'd in dist. court Ramsey county Sept. 18, 1856. G. W. Prescott, clerk. Brisbin and Bigelow, att'ys for pl'ffs in error.

Territory of Minnesota, District Court Ramsey county, 2d judicial district.

JAMES W. SIMPSON
against
ALEXANDER REY and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners under the name, style and firm of "Marshall & Co."

Summons for money demand on contract for payment of money.

To Alexander Rey, William R. Marshall and Joseph M. Marshall, defendants above named:

You and each of you are hereby summoned and required to answer the complaint in this action, of which complaint a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, in the city of

St. Paul, county of Ramsey, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of three thousand five hundred and nineteen dollars and fifty-seven cents, $3,519 $\frac{57}{100}$, with interest thereon from the seventeenth day of December, one thousand eight hundred and fifty-five, besides the costs of this action.

Dated St. Paul, December 21st, 1855.

AMES & VAN ETTEN,
*Plaintiff's Attorneys.*

Territory of Minnesota.—In the District Court, 2d judicial district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY and WILLIAM R. MARSHALL and JOSEPH W. MARSHALL, partners in business under the name, style and firm of "Marshall & Co."

The complaint of James W. Simpson, the above named plaintiff, respectfully shows to this court, and states, that heretofore, to wit, on the 14th day of June, in the year one thousand eight hundred and fifty-five, at St. Paul, in the Territory of Minnesota, the above named defendant, Alexander Rey, made his certain promissory note in writing in the words and figures following, to wit:

$3,517 7½. ST. PAUL, *June 14th*, 1855.

Six months after date I promise to pay to the order of James W. Simpson three thousand five hundred and seventeen dollars 7½ cents, value received.

(Signed) ALEXANDER REY.

Whereby he promised to pay to the order of the plaintiff, six months after the date thereof, three thousand five hundred and seventeen dollars and seven and a half cents, for value received. That the said Alexander Rey then and there delivered the said promissory note to the other defendants, William R. Marshall and Joseph M. Marshall above named, who were at the time aforesaid, and still are, partners, engaged in and doing business together at St. Paul aforesaid, by and under the copartnership name, style, and firm of "Marshall & Co." That the said defendants, William R. Marshall and Joseph M. Marshall, then and there, by their said copartnership and firm name of "Marshall & Co.," endorsed the same, by writing the said name on the back of the said note, and after so endorsing the same, then and there delivered the said note to the said Alexander Rey, who afterwards, and before the said note became due, and before the maturity thereof, delivered the

same, so endorsed, to the plaintiff. That the defendants, William R. Marshall and Joseph M. Marshall, so endorsed the said note as aforesaid for the purpose of guaranteeing the payment of the same, and for the purpose of becoming sureties and security to the plaintiff, who was and is the payee named therein, for the amount thereof.

And the plaintiff, relying upon such endorsement and guaranty by the said defendants, took the said note, and paid the full consideration for the same to the defendant, Alexander Rey.

And the plaintiff further says, that on the day when the said promissory note became due and payable, to wit, on the 17th day of December, A. D. 1855, the same was duly presented to the said Alexander Rey, the maker thereof, for payment, and the payment thereof was then and there duly demanded of him, the said maker, who neglected and refused to pay the same; and the said note was then duly protested, for want of payment thereof, by Theodore Borup, esq., a notary public in the county of Ramsey and Territory aforesaid, whereof due notice in writing was then given to the said defendants, William R. Marshall and Joseph M. Marshall, of the demand of payment thereof aforesaid, and that the said note had not been paid, and of the protest thereof, and that the holder (the plaintiff) looked to them for the payment of the same. And the plaintiff paid to the said notary two dollars and fifty cents for his fees and services in making said protest.

And the plaintiff further says, that he is now the lawful owner and holder of the said promissory note; that the said defendants have not paid the same, nor any part thereof, but remain and now are justly indebted to the plaintiff thereupon in the whole amount thereof, with interest thereon since the same became due, and the costs of the protest thereof as aforesaid.

Wherefore the plaintiff demands judgment against the said defendants respectively, for the sum of three thousand five hundred and seventeen dollars and seven cents, principal, and two dollars and fifty cents costs of the protest as aforesaid, amounting in the whole to the sum of $3,519 47, together with interest thereon from the 17th day of December, one thousand eight hundred and fifty-five, besides the costs of this action.

AMES & VAN ETTEN,
*Plaintiff's Attorneys.*

TERRITORY OF MINNESOTA,
*County of Ramsey, ss.*

James W. Simpson came personally before me, and being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the above and foregoing complaint, and that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief; and, as to those matters, that he believes it to be true. J. W. SIMPSON.

Subscribed and sworn to before me, this 21st day of December, 1855.

HARVEY OFFICER,
*Notary Public, M. T.*

TERRITORY OF MINNESOTA,
*Ramsey County, ss.*

Harvey Officer came personally before me, and being duly sworn, deposes and says, that on Saturday, the 22d day of December, A. D. 1855, between the hours of four o'clock and six o'clock in the afternoon of that day, he served the within summons and complaint personally upon Alexander Rey, William R. Marshall, and Joseph M. Marshall, to him personally known to be the identical persons named as defendants in the within action, by delivering to them and each of them, respectively, true and exact copies of the said summons and complaint, at the city of St. Paul, county of Ramsey aforesaid.

HARVEY OFFICER.

Subscribed and sworn to before me, this 24th day of December, 1855.

PARKER PAINE,
*Notary Public, M. T.*

(*The foregoing endorsed:*)

1305.—District court, Ramsey county—James W. Simpson against Alexander Rey and "Marshall & Co." Summons and complaint to file. Filed Feb'y 11, 1856. Sherwood Hough, deputy clerk; Ames and Van Etten, pl'ffs att'ys.

Territory of Minnesota, District Court, 2d judicial district, county of Ramsey.

JAMES W. SIMPSON
agst.
ALEXANDER REY, WM. R. MARSHALL, and JOSEPH M. MARSHALL, partners, under the name, style, and firm of "Marshall & Co."

GENTLEMEN: You will please take notice, that on Wednesday, the ninth day of January next, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, a motion will be made in this action, before the Hon. Moses Sherburne, judge of this court, at his chambers in the Capitol building, in the city of St. Paul, in said county of Ramsey, on behalf of the defendants, Wm. R. Marshall and Joseph M. Marshall, partners, under the name, style, and firm of Marshall & Co., for an order striking out of the complaint in this action the following parts or portions of the said complaint, that is to say—

All that part or portion of the said complaint which is in the words following:

"That the defendants, William R. Marshall and Joseph M. Marshall, so endorsed the said note as aforesaid, for the purpose of guaranteeing the payment of the same, and for the purpose of becoming sureties and security to the plaintiff, who was and is the payee named therein, for the amount thereof."

Also, all that part or portion of the said complaint which is in the following words:

"And the plaintiff, relying upon such endorsement and guaranty by the said defendants, took the said note, and paid the full consideration for the same to the defendant, Alexander Rey."

With costs of the said motion, for the following reasons:

1. Because the said several parts or portions of the said complaint are, each of them, irrelevant and immaterial.
2. Because the said several parts or portions of the said complaint are, each of them, redundant.
3. Because the said several parts or portions of the said complaint are, each of them, false and sham.
4. Because the said several parts or portions of the said complaint are, each of them, inconsistent with the other allegations of the said complaint.
5. Because the said several portions of said complaint seek to charge the def'ts Marshall as guarantors of a promissory note, without showing any contract by them expressing the consideration on which it was founded.
6. Because the said several portions of said complaint charge the defendants Marshall with a purpose and intent in making an express contract in writing different from the plain and well defined legal import of such contract, which alleged purpose and intent are incompetent either to vary the said contract or to change in any respect the legal obligations of the said defendants Marshall.
7. Because the facts stated in said complaint clearly show that the contracts of the def'ts Marshall was that of endorsement, and not that of guaranty.

You will also please take notice, that the summons and complaint in said action, or the copies thereof served on the def'ts Marshall, will be read in support of said motion.

Dated St. Paul, M. T., Dec. 31, 1855.

Yours, &c.,

BRISBIN & BIGELOW,
*Att'ys for Def'ts Marshall & Co.*

Messrs. Ames & Van Etten,
*Pl'ff's Att'ys, St. Paul, M. T.*

(*The foregoing endorsed:*)

Dist. court, 2d dist., county of Ramsey, 1,305. James W. Simp-

son ag'st Alexander Rey & Marshall & Co. No. of motion to strike out portions of complaint. Service of a copy of the within paper admitted this 31st day of December, A. D. 1855. Ames & Van Etten, plaintiff's attorneys. Filed Feb'y 11, 1856. Sherwood Hough, dep'ty clerk. Brisbin & Bigelow, att'ys for def'ts Marshall & Co., St. Paul, M. T.

Territory of Minnesota, District Court, 2d judicial district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY & WILLIAM R. MARSHALL, & JOSEPH M. MARSHALL.

The motion made on the part of the defendants, Wm. R. Marshall and Joseph M. Marshall, for an order that portions of the complaint in this action be stricken out, came on to be heard before me on Wednesday, the 9th day of January, 1856, and was argued and submitted by counsel, and after hearing Mr. Bigelow of counsel in support of said motion, and Mr. Ames of counsel in opposition to the same, and having taken the same under advisement and duly considered the matter, therefore, it is hereby ordered, that the motion of the defendants to strike out portions of the complaint in this cause be, and the same is hereby wholly denied and overruled, but without costs to either party.

Dated St. Paul, February 9, 1856.

M. SHERBURNE.

(*The foregoing endorsed:*)

1,305.—District court, 2d district, 1,305, Ramsey county. James W. Simpson against Alexander Rey, William R. Marshall and Joseph M. Taylor. Order. We admit due service of a copy of the within order upon us, this 9th day of February, 1856. Brisbin & Bigelow, att'ys for def'ts, Marshall & Co. Filed Feb'y 11th, 1856. Sherwood Hough, deputy clerk. Ames & Van Etten, plaintiff's attorneys.

Territory of Minnesota, District Court, 2d judicial district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY, WILLIAM R. MARSHALL, & JOSEPH M. MARSHALL, partners, under the name, style, and firm of "Marshall & Co."

Now come the defendants, William R. Marshall & Joseph M. Marshall, partners, under the name, style, and firm of Marshall & Co., by John B. Brisbin & Horace R. Bigelow, their attorneys,

and demur to the complaint in this action, and say that the said complaint is insufficient in law, because—

First. The said complaint does not state facts sufficient to constitute a cause of action against the said defendants, William R. Marshall and Joseph M. Marshall, or either of them, in that—

1. The facts stated in the said complaint show, that the contract of the def'ts, Marshall, upon the promissory note in said complaint mentioned, was that only of endorsement; and the allegations in the said complaint of the purpose for which the said defendants endorsed the said note, and of the reliance of the plaintiff upon such endorsement as security to him, are incompetent either to vary the said contract, or to change in any respect the legal obligations of the defendants Marshall.

2. It appears upon the face of the said complaint, that the plaintiff is the payee of the said note, that the same is payable to the order of the plaintiff, and that the plaintiff has never endorsed nor negotiated the said note.

3. The facts stated in the said complaint show, that the def'ts Marshall could only have been made liable upon the said promissory note in the character of second endorsers, and in that character only upon the endorsement and the transfer of the note by the plaintiff. The note having matured without endorsement or transfer by the plaintiff, no liability can in any event attach to the defendants Marshall, upon the same.

Second. There is a defect of parties defendant in said action, in that—

1. The defendants Marshall are not proper parties to an action by the plaintiff upon the said note, because, as appears upon the face of the complaint, they are but the endorsers of a promissory note payable to the order of the pl'ff, and as such endorsers cannot be held by the payee.

2. The facts stated in the said complaint show that the maker of the said promissory note alone is liable to the plaintiff for the payment thereof.

BRISBIN & BIGELOW,
*Attorneys for Def'ts, "Marshall & Co.,"*
*St. Paul, M. T.*

(*The foregoing endorsed:*)

1,305.—Dist. court, 2d dist., county of Ramsey. James W. Simpson agst. Alexander Rey and Marshall & Co. Demurrer to compl't. Service of a copy of the within demurrer is hereby admitted, this 10th day of March, A. D. 1856. Ames & Van Etten, pl'ff's att'ys. Filed Mar. 31, 1856. G. W. Prescott, clerk. Brisbin & Bigelow, att'ys for def'ts, Marshall & Co.

Territory of Minnesota.—District Court, second judicial district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY and WILLIAM R. & JOSEPH M. MARSHALL, partners in business under the name, style, and firm of Marshall & Co.

This action came on to be heard upon the demurrer to the complaint, and the issue of law arising thereon, and was submitted by counsel, after hearing H. R. Bigelow, esq., of counsel for the defendants, Marshall & Co., in support of the demurrer, and M. E. Ames, of counsel for the plaintiff, in opposition thereto; and having taken the same under advisement, and duly considered the issue,

It is ordered, adjudged and decreed, that the said demurrer of the defendants, "Marshall & Co.," to the said complaint, be and the same is hereby overruled. And it is further ordered, that the said defendants, Marshall & Co., have leave to answer the said complaint within ten days after notice of this order upon payment of costs on demurrer.

Dated at Chambers, May 8, '56.

M. SHERBURNE, *Judge.*

(*The foregoing endorsed:*)

1,305.—District court, Ramsey county. James W. Simpson against Alexander Rey and "Marshall & Co." Order overruling demurrer to complaint. Filed May 12, 1856. G. W. Prescott, clerk. Ames & Van Etten, plaintiff's attorneys. We admit due service of a copy of the within order on us, at our office, this 8th day of May, 1856. Brisbin & Bigelow, def'ts' att'ys.

Territory of Minnesota.—District Court, second judicial district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY, and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners under the name, style, and firm of Marshall & Co.

COUNTY OF RAMSEY, *ss.*

Michael Ames came personally before me, and being duly sworn, says, that he is one of the attorneys of the plaintiff in the above entitled action. That the summons, together with a copy of the complaint therein, was served personally upon the above named defendants, each respectively, on the 22d day of December, A. D. 1855, and that the time within which the defendants were required by the summons, and the provisions of the statute, to answer the said complaint, has long since passed and expired, and that all

further time allowed and given by the order and leave of the court aforesaid, or by the judge thereof, allowing or permitting the defendants, or any of them, to answer the said complaint, has also passed and expired, and that no answer or copy of any answer of the defendants or either of them to the said complaint has been served upon the plaintiff's attorneys, or received by them or either of them in said action.

M. E. AMES.

Subscribed and sworn to before me, this 23d day of May, 1856.

HARVEY OFFICER,
*Notary Public, M. T.*

(*The foregoing endorsed:*)

1,305.—District court, Ramsey county. James W. Simpson against Alexander Rey and "Marshall & Co." Affidavit of no answer. Filed May 23, 1856. G. W. Prescott, clerk. Ames & Van Etten, plaintiff's attorneys.

Territory of Minnesota.—District Court, county of Ramsey, second judicial district.

JAMES W. SIMPSON
against
ALEXANDER REY, and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners in business under the name, style, and firm of Marshall & Co.

Notice of application for Judgment.

GENTLEMEN: Please to take notice, that an application founded upon the papers on file, and record in the above entitled action, will be made on behalf of the plaintiff to the Honorable Moses Sherburne, judge of the district court aforesaid, at the next term of the said district court, to be holden at the court-house, in the city of Saint Paul, in the county of Ramsey, and second judicial district aforesaid, on the first Monday (2d day) of June next at ten (10) o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for judgment in favor of the plaintiff as demanded in the complaint.

Dated May 22d, 1856.

Yours, respectfully,
AMES, VAN ETTEN, *Plaintiff's Attorneys.*

To Messrs. BRISBIN & BIGELOW,
*Att'ys for Def'ts, Marshall & Co.*

(*The foregoing endorsed:*)

District court, Ramsey county. James W. Simpson against Alexander Rey and "Marshall & Co." Notice of application for judgment. We admit due service of a copy of the within notice on us, this 22d day of May, 1856. Brisbin & Bigelow, att'ys for def'ts, Marshall. Ames & Van Etten, plaintiff's attorneys.

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Territory of Minnesota.—District Court, second judicial district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY, and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners in business under the name, style, and firm of Marshall & Co.

This cause came on to be heard on the issue of law joined upon the demurrer of the above named defendants, William R. Marshall and Joseph M. Marshall, to the complaint therein, on the twenty-sixth day of March, 1856, before the Honorable Moses Sherburne, judge of the district court in the second judicial district and county of Ramsey aforesaid, and the decision and order in writing of the said judge in favor of the plaintiff, and overruling said demurrer, having been made and served on the 8th and filed on the (12th) twelfth day of May, 1856.

And it further appearing from the affidavit of M. E. Ames, esq., one of the plaintiff's attorneys, on file in the cause, that the time allowed to the said defendant Rey to answer the complaint has expired, and that no answer or copy of an answer of the defendant to the complaint has been served upon the plaintiff's attorneys;

And notice of the application for judgment on behalf of the plaintiff having been duly given—

On motion of Ames & Van Etten, attorneys for the plaintiff, it is hereby ordered and adjudged, that James W. Simpson, the plaintiff, recover of and from Alexander Rey, William R. Marshall and Joseph M. Marshall, the defendants, the sum of thirty-six hundred and fifty-eight dollars and forty-eight cents, the amount claimed, principal and interest, together with the sum of thirty-five dollars and forty-five cents costs and disbursements, amounting in the whole to the sum of $3,693 93.

July 10, 1856.

M. SHERBURNE, *Judge.*

(*The foregoing endorsed:*)

District court, 2d judicial district, county of Ramsey. James W. Simpson against Alex. Rey and Wm. R. & J. M. Marshall. Order for judgment. Ames & Van Etten, plaintiff's attorneys.

Territory of Minnesota.—District Court 2d district, county of Ramsey.

JAMES W. SIMPSON
against
ALEXANDER REY, and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners in business under the name, style and firm of "Marshall & Co."

Pursuant to the order of court, this day made in this cause and entered of record, on motion of Ames and Van Etten, plaintiff's attorneys, it is hereby adjudged that the plaintiffs above named recover of the defendants above named the sum of thirty-six hundred and fifty-eight dollars and forty-eight cents damages, and thirty-five dollars and forty-five cents costs, amounting to $3,693 93.

Dated July 10, 1856.

G. W. PRESCOTT, *Clerk.*

*Statement for Judgment.*

| | | |
|---|---|---|
| Principal claimed | | 3,519 57 |
| Interest " | | 138 91 |
| | | $3,658 48 |
| Statute costs, 7, 7, 15 | 29 00 | |
| 2 affidavits | 50 | |
| Clerk's fees | 5 95 | |
| | | 35 45 |
| | | $3,693 93 |

(The foregoing endorsed:) District court Ramsey county. Jas. W. Simpson ag'st Rey and Marshall & Co. Judgment roll. Filed July 10, 1856. G. W. Prescott, Clerk.

Supreme Court.

WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, Pl'ffs in error,
against
JAMES W. SIMPSON, Def'ts in error.

Points of plaintiff in error, with authorities relied on.

I. The contract of the defendants (pl'ffs in error) was that of endorsers, and a contract of a different character cannot arise and will not be implied in conflict with the written agreement. The defendants being endorsers, they are endorsers of the pl'ff and not liable to him.

17th Johns., 326; 17 Wen. 214; 2 Hill, 80; 3 Ibid. 233; 7 Ibid. 416; 19th Wend. 202; 6 Barber, 282; 1 Comstock, 321; 1 Spence N. Y., 256; 1 Green Ia. 331; 13 Lin. and Man. 617; 1 Jones' Pen., 46; Story on Promissory Notes, sec. 134, note; Story on Bills, 215; 11 Johns. 201; 1 Phillips' Er. 547; 6 Hill, 219; 1 Johns. Ch. B., 429; 4 Selden, 207; 2 Comstock, 553; 5 Denio, 484; Rev. Stat., p. 268, sec. 281 and 2.

II. The complaint charges the defendants as guarantors, and shows that the contract was cotemporaneous with the inception of the note, and no construction of the authorities will charge them upon such fact otherwise than as original maker.

III. In no view can the defendants upon this *com.* be regarded, except as endorsers, because, conceding that the written contract of the parties may be varied by a contemporaneous parol agreement, facts are not stated in the pleadings from which the court can infer the nature of the contract.

IV. The complaint is double. If any contract besides that of endorsers is stated, it contains in the same count a contract of endorsement and of guranty. There are distinct causes of action, and should be separately stated.

Vide Rev. Stat., p. 340, sec 7; Vide 2 Code Rs., p. 145; Vide 4 H. and R., 226; Vide 5 Ibid. 172; Vide 7 Barbour, 80.

Jan. 12, 1856.

BRISBIN & BIGELOW,
*Counsel of Pl'ffs in Error.*

(*The foregoing endorsed:*)

Supreme Court. W. R. Marshall and J. M. Marsall, pl'ffs in error, against James W. Simpson, def't in error. Brief of pl'ffs in error. Filed Jan. 19, 1857. G. W. Prescott, clerk. Brisbin & Bigelow, counsel of pl'ffs in error.

In the Supreme Court, Territory of Minnesota.

ALEXANDER REY, and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners in business, under the name, style, and firm of Marshall & Co., Plaintiffs in error,
against
JAMES W. SIMPSON, Defendant in error.

The following points and authorities are relied upon for the defendant in error:

First. The plaintiffs in error, William R. Marshall and Joseph M. Marshall, as parties to the promissory note described in the complaint, became and assumed the legal liability of guarantors and sureties for the payment of the same.

See 14 Johnson's Rep., p. 349, Campbell v. Butler; 1 Hill's Rep., p. 91, Labran & Ives v. Worane; 13 Johnson's Rep., p. 175, Nelson vs. Duboiss; 9 Mass. Rep., p. 313, White vs. Howland; 11 Mass. Rep., p. 436, Mories vs. Bird; 2 Comstock Rep., p. 225, Brown vs. Curtis; 7 Mass. Rep., p. 232, Ulen vs. Kitridge; Story on Prom. Notes, sec. 479 and 480, and notes on page 641, 3d ed.; Same, p. 630, sec. 475 and 476 and notes; Do., sec. 477 and 479, page 638.

Second. The endorsement of the promissory note by Marshall & Co., at the time of the making and before delivery thereof, was an original undertaking on their part to pay the same, or at least to guarantee the payment thereof.

In support of this point see the authorities above cited.

Third. The endorsement by Marshall & Co. having been made

at the date of the note, and before delivery, for the express purpose of giving credit to the maker, and enabling him to negotiate the same to the payee thereof, renders them primarily liable as original parties to the note.

6 Conn. Rep., p. 315 ; 7 Conn. Rep., p. 310 ; 11 Conn. Rep., p. 440 ; 9 Vermont Rep., p. 345 ; 12 Vermont Rep., p. 219 ; 16 Vermont Rep., p. 554 ; 17 Vermont Rep., p. 285 ; 1 N. Hamp. Rep., p. 385 ; 2 McCord Rep., p. 388 ; 9 Ohio Rep., p. 39 ; 13 Ohio Rep., p. 328.

Fourth. The time and circumstances when and under which the note was made, endorsed, and delivered, may be properly alleged and proved, to enable the court to apply the law governing the same.

See the authorities before cited, and 4th Watts' Rep., p. 448 ; 9 Ohio Rep., p. 39 ; 2 McLean Rep. p. 553.

Fifth. The decision and judgment below is well sustained by the law of the case.

See authorities before cited.

AMES & VAN ETTEN,
*Att'ys and Counsel for Def't in Error.*

(*The foregoing endorsed:*)

Alex. Rey and Marshall & Co., pl'ffs in error, against James W. Simpson, def't in error. Points filed Jan. 15, 1856. G. W. Prescott, Clerk.

In the Supreme Court, at the January Term, 1857.—January 29, A. D. 1857.

ALEXANDER REY, and WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners, under the name, style, and firm of "Marshall & Co.," Plaintiffs in error,
against
JAMES W. SIMPSON, Defendant in error.

This cause having been brought into this court by a writ of error issued to the district court of the county of Ramsey, second judicial district, and the same having been fully heard here and duly considered by this court, and it appearing to the court here that no error has intervened or exists in the proceedings and judgment rendered in the cause in the said district court, and that the said judgment ought to be affirmed;

And on motion of Ames & Van Etten, attorneys for the defendants in error, it is further ordered and adjudged here by this court that the judgment rendered in this cause in the district court aforesaid be, and the same is now here, by this court, in all things affirmed; and that the said James W. Simpson, defendant in error, here recover in this court of the said Alexander Rey, William R.

Marshall, and Joseph M. Marshall, plaintiffs in error in this court, the sum of three thousand six hundred and ninety-three dollars and ninety-three cents, ($3,693 93,) the amount of the judgment rendered in the cause in the said district court, together with ten per cent. damages thereon, amounting to the further sum of three hundred and sixty-nine dollars and thirty-nine cents, ($369 39,) with the further sum of two hundred fifty-two dollars and forty-cents, ($252 40,) interest which has accrued upon the judgment rendered in the cause in the district court aforesaid since the rendition and entry thereof, amounting, in the whole, to the sum of four thousand three hundred and fifteen dollars and seventy-two cents, ($4,315 72,) together with the costs of this court to be taxed; and that he have execution therefor from this court.

A true record.
Attest: GEO. W. PRESCOTT, *Clerk.*

A true transcript of the record.
Attest: GEO. W. PRESCOTT, *Clerk.*

(*The foregoing endorsed:*)

Supreme Court.—Alexander Rey and William R. Marshall and Joseph M. Marshall, pl'tffs in error, vs. James W. Simpson, def't in error. Order of affirmance of judgment.

Supreme Court, Territory of Minnesota.—General Term, 1857.

WILLIAM R. MARSHALL and JOSEPH M. MARSHALL, partners as "Marshall & Co.," impleaded with Alex. Rey, Plaintiff in error,
against
JAMES W. SIMPSON, Defendant in error.

Pursuant to the order of court, made in this cause at the January general term, A. D. 1857, on motion of Ames & Van Etten, attorneys for the defendant in error, it is hereby adjudged that James W. Simpson, above named, recover of Alexander Rey, William R. Marshall, and Joseph M. Marshall, above named, the sum of four thousand three hundred and fifteen dollars and seventy-two cents, amount of judgment below, with interest and ten per cent. damages, and fifty-six dollars and twenty-five cents costs, taxed in this court, amounting to the sum of $4,371 97.

Dated Feb. 4, 1857.

GEO. W. PRESCOTT, *Clerk.*

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|---|---|
| Amount of judgment below ..... | 3,693 93 |
| 10 per cent. damages, 369 39; int., 252 40 ..... | 621 79 |
| | 4,315 72 |